No. 89-1184

In The

Supreme Court of the United States

October Term, 1989

JEROME LACKE, STANLEY KLEIN,
DAVID NIEMANN, and DIANE KOHN,

Petitioners,

vs.

CHERYLL GRAY, f/k/a CHERYLL LENGYEL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Counsel of Record:

ATTORNEY JEFF SCOTT OLSON
JULIAN, OLSON & LASKER, S.C.
330 E. Wilson Street
Madison, Wisconsin 53703
(608) 255-6400

On Brief:

ATTORNEY A. STEVEN PORTER
25 W. Main Street
Suite 503
Madison, Wisconsin 53703
(608) 255-5170

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

ARGUMENT SUMMARY

The Court of Appeals for the Seventh Circuit reversed the district court, below, and held Section 893.53, Wis. Stats., rather than Section 893.54, Wis. Stats., to be the statute of limitations applicable to actions brought under 42 U.S.C. Section 1983 in federal courts in Wisconsin. Section 893.53, Wis. Stats, provides a six-year limitations period for actions "to recover damages for an injury to character or rights of another, not arising on contract, . . . , except where a different period is expressly prescribed . . . ," and Section 893.54, Wis. Stats., provides a three-year limitations period for "an action to recover damages for injuries to the person." Applying the analysis provided by this Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), and *Owens v. Okure*, 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 504 (1989), the Court of Appeals found that Wisconsin provided more than one statute of limitations for personal injuries and that Section 893.53 is Wisconsin's general or residual personal injury statute of limitations.

Petitioners contend that the Court of Appeals' decision conflicts with the decisions of this Court in *Wilson* and *Owens*, decisions of the Courts of Appeals for the Sixth and Ninth Circuits, and decisions of Wisconsin's court of last resort. Petitioners also claim that the Court of Appeals' decision is inconsistent with important federal interests attached to Section 1983.

Petitioners are in error because the Court of Appeals' determination that Section 893.53, Wis. Stats., is Wisconsin's general and residual personal injury statute of limitations under *Wilson* and *Owens* is well-founded in its

review of the pertinent state-court decisions, the decisions of Wisconsin's federal district courts, and the language of the statutes in question. Petitioners themselves admit that the Court of Appeals' decision is not in direct conflict with the other Court of Appeals' decisions they cite. And, neither is it in conflict with the decisions of the Wisconsin Supreme Court because that court has clearly held that Section 893.53, Wis. Stats., is its residual personal rights statute, and, in a decision rendered three months prior to the Court of Appeals' decision in this case, it expressed that it had not yet decided which of the two statutes now in issue in this case it finds applicable to Section 1983 actions in Wisconsin state courts.

Finally, petitioners have not shown that Section 893.53, Wis. Stats., is any more inconsistent with the important federal interests embodied in Section 1983 than Section 893.53, Wis. Stats., or any other statute of limitations. The history of the two statutes shows Section 893.53, Wis. Stats., to have remained substantively unchanged for over one hundred and thirty years while the substantive provisions of Section 893.54, Wis. Stats., have been changed by the legislature a number of times in that period.

Petitioners also claim that the Court of Appeals departed severely from accepted doctrines of preclusion when it failed to bar respondent's First Amendment claims brought under Section 1983 on the basis of her voluntary dismissal with prejudice of her Title VII claims brought in an earlier action against the County of Dane (by whom petitioners were employed as respondent's supervisors). Petitioners first raised this issue below in their oral argument before the Court of Appeals after

respondent's counsel had used up all of his time. The issue has not been briefed below and neither the Court of Appeals nor the District court addressed it. Petitioners have waived the issue of the preclusive effect of her voluntary dismissal with prejudice of her Title VII claims in her prior action against the County of Dane.

In addition, it must be noted that resolution of the preclusion issue would certainly turn upon whether petitioners, as respondent's employment supervisors, could have been made proper party defendants in their individual capacities on respondent's Title VII claims in the prior action against the County. This issue has not yet been decided by the Court of Appeals for the Seventh Circuit. It would be premature for this Court to address this issue without benefit of an opinion from the Seventh Circuit Court of Appeals.

For these reasons, petitioners' petition for a Writ of Certiorari should be denied.

ARGUMENT

The decision of the United States Court of Appeals for the Seventh Circuit in this case does not give rise to "special and important reasons" that would support issuance of a Writ of Certiorari. (Rule 10.1, Revised Rules of Supreme Court, adopted December 5, 1989, 107 L.Ed.2d i, v.)

I. THE DECISION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ACCORDS WITH THE DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH DECISIONS RENDERED IN OTHER CIRCUITS OR THE WISCONSIN SUPREME COURT REGARDING THE SELECTION OF THE MOST ANALOGOUS WISCONSIN STATUTE OF LIMITATIONS TO APPLY TO ACTIONS UNDER 42 U.S.C. SECTION 1983 IN FEDERAL COURTS IN WISCONSIN.

The United States District Court for the Western District of Wisconsin interpreted the decision of this Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), to require application of Wisconsin's three-year limitations period for actions for damages "for injuries to the person" and "for death caused by the wrongful act, neglect or default of another," found in Section 893.54, Wis. Stats., to respondent's claims brought pursuant to 42 U.S.C. Section 1983 (hereinafter Section 1983) in this action. (Petitioners' Appendix at 34A.) The District Court rendered its decision prior to this Court's decision in *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). (*Id.* at 39A.) On appeal, the Court of Appeals for the Seventh Circuit, interpreting *Wilson* in light of the then-recent *Owens* decision, determined that *Owens* mandates the application of Wisconsin's "general or residual statute for personal injury actions" to respondent's Section 1983 claims. *Gray v. Lacke*, 885 F.2d 399, 407 (7th Cir. 1989) (See Petitioners' Appendix at 13A.) The Court of Appeals, applying the *Owens* criteria, found Wisconsin's general or residual statute of limitations for personal injury actions to be Section 893.53, Wis. Stats., which provides a six-year limitations period for "[a]n action to recover damages for an injury to the character or rights of

another, not arising on contract, . . . , except where a different period is expressly prescribed. . . ." *Id.* at 407-8 (P. App. at 13A.)

Petitioners petition this Court for a Writ of Certiorari to review the decision of the Court of Appeals, claiming that the Court of Appeals' decision is contrary to this Court's decisions in *Wilson* and *Owens*, and that it is in conflict with decisions of other United States Courts of Appeals and of the Wisconsin Court of Appeals. (Petitioners' Brief, pp. 5-13.) Petitioners' petition should be denied because the Seventh Circuit Court of Appeals carefully and appropriately applied this Court's directions in *Wilson* and *Owens* to select Wisconsin's general or residual personal injury statute of limitations as applicable to actions brought pursuant to Section 1983 in federal court; because, as petitioners, themselves, admit, the Court of Appeals decision in this case is not in conflict with the decisions of other United States Courts of Appeals, (See P. Brief at 10); and, because, again by petitioners' own admission, the Court of Appeals decision is not in conflict with any decision of the Wisconsin Supreme Court, (See P. Brief at 12); and because petitioners have not shown that the Court of Appeals decision fails to protect and further the federal interests inherent in Section 1983.

A. The United States Court of Appeals for the Seventh Circuit Properly Applied this Court's Directive, as Set Forth in *Wilson v. Garcia* and *Owens v. Okure*, to Look to the State's General or Residual Statute of Limitations for Personal Injury Actions When Seeking the Most Analogous State Statute of Limitation to Utilize in Actions Brought Under 42 U.S.C. Section 1983 in Federal Courts.

In *Wilson v. Garcia*, this Court, in an effort to eliminate the "conflict, confusion and uncertainty," surrounding the efforts of state and federal courts to devine the

most analogous state statute of limitations to apply in Section 1983 actions, concluded that Section 1983 actions are best characterized as conferring a "general remedy for injuries to personal rights." 471 U.S. 261, 266, 278, 105 S.Ct. 1938, 85 L.Ed.2d 254, 260, 268; *Owens v. Okure*, 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 594, 600 (1989). The Court then held that, since section 1983 actions are "best characterized as personal injury actions," the United States Court of Appeals for the Tenth Circuit had appropriately selected New Mexico's "statute of limitations governing actions 'for an injury to the person or reputation of any person' " for application to Section 1983 actions in federal courts in that state. 471 U.S. at 280, 105 S.Ct. 1938, 85 L.Ed.2d at 269.

In *Owens v. Okure*, this Court recognized that *Wilson* had not answered the question of what to do when state law presented more than one statute of limitations for personal injury actions. 448 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 594, 600 (1989). In *Owens*, this Court directed that, in such cases, the appropriate statute of limitations to apply to Section 1983 actions is "the general or residual statute for personal injury actions." 448 U.S. ___, 109 S.Ct. at 582, 102 L.Ed.2d at 605-6.

In the case at bar, the Court of Appeals determined that Wisconsin has two different personal injury statutes, Section 893.54, Wis. Stats., which provides a three-year limitations period " 'for injuries to the person' " and wrongful death actions, and Section 893.53, Wis. Stats., which provides a six-year limitations period " 'for an injury to the character or rights of another, not arising under contract . . . except where a different period is expressly prescribed.' " *Gray v. Lacke*, 885 F.2d 399, 407; (P.

App. at 12A-13A.) The Court of Appeals then observed that this Court in *Owens* had held:

> " 'that where state law provides multiple statutes of limitations for personal injury actions, courts considering Section 1983 claims should borrow the general or residual statute for personal injury actions,' *Gray v. Lacke*, 885 F.2d at 407, quoting from *Owens*, 109 S.Ct. at 582, 102 L.Ed.2d at 606; (P. App. at 12A-13A.)

and concluded:

> "*Owens* mandates that for Section 1983 actions, we must choose the Wisconsin statute of limitations which is a general or residual statute for personal injury actions." *Id.*

Looking to State Court interpretations of Section 893.53, Wis. Stats.; the language of Section 893.53, Wis. Stats., as compared to that of Section 893.54, Wis. Stats.; and the interpretations of federal district courts in Wisconsin, the Court of Appeals determined that Section 893.53, Wis. Stats., was the general or residual personal injury statute of limitations applicable, under *Owens*, to Section 1983 actions in federal courts in Wisconsin. *Id.* at 407-9; (P. App. at 13A-16A.)

Petitioners assert that the Court of Appeals erred in applying *Owens* to the case at bar, although they do not make clear how, exactly, the Court of Appeals erred. (P. Brief at 7-8.) At one point petitioners seem to assert that the Court of Appeal should not have applied *Owens* to this case at all because, according to petitioners, Wisconsin "has one, and only one, general personal injury statute of limitations," that being Section 893.54, Wis. Stats., for "[a]n action to recover damages for injuries to the person." (P. Brief at 8.) However, just before making that

assertion, petitioners acknowledge that Section 893.53, Wis. Stats., is a " 'residual tort' statute" embracing "some of the more esoteric common-law tort actions that do not have a specified limitation period", and, petitioners later recognize that Wisconsin has numerous statutes establishing limitations periods for "specified intentional torts, and numerous exceptions for certain types of personal injury actions, see WIS. STAT. Secs. 893.55, .56, .57, .585, .587, but only one [Section 893.54, Wis. Stats.] which speaks generally of 'injuries to the person'." (*Id.* at 7-8.) If petitioners' argument is that, in *Owens*, this Court distinguished between general personal injury statutes and residual personal injury statutes, and preferred the former, (*Id.*), then petitioners misunderstand the concept of "general or residual personal injury statutes" as used in *Owens*. If, petitioners' argument is that Section 893.54, Wis. Stats., should be construed to be Wisconsin's general *and* residual personal injury statute because Section 893.53, Wis. Stats., does not encompass "personal injury" actions, then they interpret the scope of the term "personal injury" as used by this court in *Wilson* and *Owens* too narrowly; they misunderstand the wide range of personal injury statutes of limitations in Wisconsin and the specific, limited application of Section 893.54, Wis. Stats.; and they ignore this Court's traditional deference to a Court of Appeals interpretations of state law.

This Court's decision in *Owens* clearly did not distinguish between "general" and "residual" personal injury statutes of limitations. 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 604. "Indeed," the Court stated,

> "the very idea of a general or residual statute suggests that each State would have no more than one." *Id.*

In Wisconsin, as the Court of Appeals found, the general and residual personal injury statute is Section 893.53, Wis. Stats. *Gray v. Lacke*, 885 F.2d at 407-9. And in *Owens*, this Court expressly recognized Section 893.54, Wis. Stats., to be a specific, rather than a general or residual statute of limitations. 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 602, n. 8. Section 893.53, Wis. Stats., was not included in that characterization by the Court. *Id.* Wisconsin courts, too, have consistently interpreted Section 893.54, Wis. Stats., as pertaining narrowly and specifically to actions alleging negligent infliction of bodily injuries and accompanying emotional injuries. *Acharya v. Carroll*, 152 Wis. 2d 330, 337, 448 N.W.2d 275 (1989); *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 292 N.W.2d 816, 822 (1980) (no action for negligent infliction of emotional distress without bodily injury); *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 694, 271 N.W.2d 368 (1978) (no action for negligent infliction of emotional distress without physical injuries); *Shovers v. Hahn*, 178 Wis. 615, 190 N.W. 432 (1922) (interpreting predecessors to Section 893.54, Wis. Stats.); *Klingbeil v. Saucerman*, 165 Wis. 60, 160 N.W. 1051, 1052 (1921); *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (1900); See also, comment, 1952 *Wis. L. Rev.* 105, 106-7 (1962). As this Court has noted (and as petitioners acknowledge, (P. Brief at 8)), Wisconsin also has numerous other statutes of limitations for specific intentional and negligent personal injuries. *Owens v. Okure*, 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 602, n. 8. Wisconsin courts have consistently characterized Section 893.53,

Wis. Stats., and its predecessors as the general and residual statute for every type of tort, including injuries to personal rights. See, *Acharya v. Carroll*, 152 Wis. 2d 330, 337, 448 N.W.2d 275; and *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333 (App. 1983) and the cases cited therein.

Although this Court, in *Wilson*, stated that "Section 1983 claims are best characterized as personal injury actions," 471 U.S. at 280, 105 S.Ct. 1938, 85 L.Ed.2d at 269, it made clear in *Owens* that it had used the term "personal injury actions," not in the narrow sense of negligent infliction of bodily injuries, but in the broader sense of " 'a general remedy for injuries to personal rights.' " *Owens v. Okure*, 448 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 600. The Court of Appeals recognized this broader meaning of the term "personal injury action" as used in *Wilson* and *Owens*, when it selected Section 893.53, Wis. Stats., over Section 893.54, Wis. Stats. in the decision below. *Gray v. Lacke*, 885 F.2d at 407-8; see also, *Saldivar v. Cadena*, 622 F. Supp. 949, 955 (W.D. Wis. 1985).

The Court of Appeals in this action correctly applied *Owens* by looking to Wisconsin state and federal court decisions which characterize Section 893.53, Wis. Stats., as a general or residual statute of limitations for actions alleging injury to personal rights. See, *Owens v. Okure*, 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 606, n. 12; *Gray v. Lacke*, 885 F.2d at 408; see also, *Acharya v. Carroll*, 152 Wis. 2d at 337-8, 448 N.W. 2d 275; *Saldivar v. Cadena*, 622 F. Supp. at 954-6. The Court of Appeals also faithfully followed *Owens* in looking to the statutory language and application of Sections 893.53 and .54, Wis. Stats., to

ascertain which reflected the broader or "catchall" character of a general or residual statute of limitations for personal injury actions. See, *Owens v Okure*, 488 U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d at 604 and n. 9; *Gray v. Lacke*, 885 F.2d at 408. Since Section 893.54, Wis. Stats., applies only to negligent bodily injuries, and does not contemplate unspecified causes of action for intentional personal injuries or personal injuries not linked to bodily injuries, it cannot be construed as Wisconsin's general or residual personal injury statute.

The decision of the Court of Appeals for the Seventh Circuit is not in conflict with the applicable decisions of this Court concerning solution of the appropriate state court limitations to apply to actions under Section 1983.

B. The Decision of the United States Court of Appeals for the Seventh Circuit Is Not in Conflict with Decisions of the Sixth or Ninth Circuits.

Petitioners assert that the United States Court of Appeals for the Seventh Circuit's interpretation and application of *Wilson* and *Owens* is in conflict with decisions of the Sixth Circuit Court of Appeals in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) and *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989), and the Ninth Circuit Court of Appeals in *Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989). (P. Brief at 8 – 9) In fact, there is no conflict between these Courts, as petitioners themselves acknowledge, because each court's decision addresses a different issue. (P. Brief at 10.)

In *Browning* the choice before the Court was between a statute of limitations applicable to all intentional torts

and one generally applicable to bodily injuries. 869 F.2d at 990. In *Emmons*, the Court was presented with the same choice, 874 F.2d 354. In *Del Percio*, the Ninth Circuit was faced with a choice between a general "catchall" statute that apparently covered any type of action other than personal injury actions, and a "catchall" personal injury statute. 877 F.2d at 786 and at n.3. In the case at bar, the choice was between a specific personal injury statute for bodily injury, Section 893.54, Wis. Stats., and a general, residual personal injury statute, Section 893.53.

In all of these Court of Appeals decisions, the Courts acknowledged that *Owens* requires selection of "the residual or general personal injury statute of limitations" in instances where state law presents more than one personal injury statute. *Browning v. Pendleton*, 869 F.2d at 991; *Emmons v. McLaughlin*, 874 F.2d at 354; *Del Percio v. Thornsley*, 877 F.2d at 786; *Gray v. Lacke*, 885 F.2d at 407 (P. App. at 13A). Furthermore, in *Carroll v. Wilson*, 787 F.2d 44 (6th Cir.) (per curiam), *cert. denied* 479 U.S. 923, 107 S.Ct. 330, 93 L.Ed.2d 302 (1986), the Sixth Circuit Court of Appeals, applying the teachings in *Wilson*, selected Michigan's residual, "catchall" personal injury statute over an intentional tort statute and a libel and slander statute. In the case at bar, the Court of Appeals chose the general, residual personal injury statute over the specific, negligent-bodily-injury statute.

Thus, petitioners have failed to show any conflict, whether in results or principles, between the decision rendered by the Court of Appeals in this case and the decisions rendered in any other court of appeals.

It should be noted that the Court of appeals decisions here does not conflict with its decision in *Herman v. City of Chicago*, 870 F.2d 400 (7th Cir. 1989) as petitioners assert. (P. Brief at 9.) The issue in *Herman* did not involve a choice among statutes of limitations, but whether the doctrine of laches should be applied under the facts of that case. *Id.* The Court in *Herman* did not consider or "reject" the approach used by the Court of Appeals in this case as petitioner's propose. (P. Brief at 9.)

C. The Court of Appeals Decision in This Case Is Consistent With Federal Interests.

This Court, in *Wilson* and *Owens*, sought to put an end to the "conflict, confusion and uncertainty" and diversion of judicial resources that characterized the search by courts across the nation for appropriate, analogous state statutes of limitations to apply under Section 1988 to Section 1983 actions, while ensuring that the important federal interests vindicated by Section 1983 would be protected. *Wilson v. Garcia*, 471 U.S. 261, 266, 278, 279, 105 S.Ct. 1938, 85 L.Ed.2d 254, 260, 268-9; *Owens v. Okure*, ___ U.S. ___, 109 S.Ct. 573, 102 L.Ed.2d 594, 600 (1989). The Court of Appeals decision in this case accomplishes those purposes. Conflict, confusion, and uncertainty surrounding selection of the appropriate state statute of limitations to apply to Section 1983 actions in federal courts in Wisconsin is ended, because, as petitioners concede, for the first time, the Court of Appeals for the Seventh Circuit has decided this issue for Wisconsin federal courts. (P. Brief at 5)

Petitioners have not contended that Section 893.53, Wis. Stats., is inherently less suitable to the vindication of the protections provided under Section 1983 than is Section 893.54, Wis. Stats., the statute they advocate. Indeed, they concede that the limitations period of six-years found in Section 893.53, Wis. Stats., being twice as long as the three-year period provided in Section 893.54, Wis. Stats., is more favorable to plaintiffs, (P. Brief at 10), presumably because it preserves more meritorious Section 1983 claims. Furthermore, the statute of limitations usually applied to reconstruction-era federal civil rights statutes by federal district courts in Wisconsin prior to this Court's decision in *Wilson* was the six-year period found in Section 893.93(1)(a), Wis. Stats., and its predecessors. *Saldivar v. Cadena*, 622 F.Supp. 949, 956 (W.D. Wis. 1985); and, see, e.g., *Minor v. Lakeview Hospital*, 421 F. Supp. 485, 487 (E.D. Wis. 1976); *Reeves v. Westinghouse Electrical Corporation*, 430 F. Supp. 623, 624 (E.D. Wis. 1971); *Kuesey v. Powers*, 79 FRD 151 (W.D. Wis. 1978); (the Court of Appeals for the Seventh Circuit had directed as early as 1958 that statutes of limitations for statutory "civil actions not otherwise provided for" were to be used in Section 1983 actions, *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958); *Waters v. Wisconsin Steel Works of International Harvester Company*, 427 F.2d 476, 488 (7th Cir. 1970); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977)).

However, petitioners argue that the Court of Appeals decision selecting Section 893.53, Wis. Stats., jeopardizes federal interests in the long run because Section 893.53, Wis. Stats., is less used in Wisconsin than Section 893.54, Wis. Stats., and therefore more susceptible to being tampered with by a state legislature intent upon limiting the

state's exposure to meritorious Section 1983 actions. (P. Brief at 10-11.) The gist of petitioners argument seems to be that federal interests require drastically shortening the limitations period now to make sure Wisconsin's legislature does not attempt the same thing at some indefinite time in the future.

Petitioners' concern is unfounded. Wisconsin appellate courts have found Section 893.53, Wis. Stats., applicable to a number of causes of action, including attorney malpractice, *Acharya v. Carroll*, 152 Wis. 2d 330, 448 N.W.2d 275 (App. 1989); malicious prosecution and tortious interference with beneficial relations, *Segall v. Hurwitz*, 114 Wis. 2d 471, 339 N.W.2d 333, 341, 342 (App. 1983); and criminal conversion, *Woodman v. Goodrich*, 234 Wis. 565, 566-7, 291 N.W. 768, 769 (1940); and that it serves as a "blanket limitation on tort actions when no other period of limitation is expressly prescribed," *Acharya v. Carroll*, 152 Wis. 2d at 337-8, 448 N.W.2d 275. It is unlikely that the Wisconsin legislature would find it particularly attractive to unduly shorten the limitations period in these actions just to impair federal court Section 1983 actions.

The history of Sections 893.53 and 893.54, Wis. Stats, also belies petitioners' argument. In fact, the statute of limitations period for negligent personal injury, which is now Section 893.54, Wis. Stats., has gone through a number of substantive changes at the hands of the Wisconsin legislature over the last one hundred and thirty years while the residual tort statute, now found in Section 893.53, Wis. Stats., has undergone none. Compare Wis. Rev. Stat. 1138, Section 17(5) (1858); Wis. Rev. Stat. Ch.

177, Section 4222(5) (1898); Section 330.19(5), Wis. Stats. (1955); Section 330.205, Wis. Stats. (1957).

Federal interests inherent in Section 1983 protections are not adversely implicated by the decision of the Court of Appeals in this action.

D. The Decision of the Court of Appeals Is Not in Conflict with the Decisions of the Highest Wisconsin Court.

Petitioners would persuade this Court that a Writ of Certiorari should issue because the decision of the Court of Appeals in this matter is in conflict with a 1985 decision of the Wisconsin Court of Appeals, an intermediate appellate court in Wisconsin. (P. Brief at 11-13.) In fact, the United States Court of Appeals decision is not in conflict with the decisions of Wisconsin's court of last resort, the Wisconsin Supreme Court.

In 1985, shortly after this Court decided *Wilson*, the Wisconsin Court of Appeals, an intermediate level appellate court, in *Hanson v. Madison Service Corp.*, reversed the trial court and held, in light of *Wilson*, that the three-year limitations period found in Section 893.54, Wis. Stats., rather than a one-year period applicable to administrative actions under the Municipal Employment Relations Act (MERA), Section 111.07(14), Wis. Stats., should apply to Section 1983 actions in Wisconsin circuit courts. 125 Wis. 2d, 370 N.W.2d 586, 587 (App. 1985). The court did not consider the applicability of Section 893.53, Wis. Stats., in its decision. *Felder v. Casey*, 150 Wis.2d 458, 441 N.W.2d 725, 730 at n. 7 (1989). The Wisconsin Court of Appeals decided *Hanson* well before this Court's decision

in *Owens* and also prior to the well-reasoned decision of Judge Barbara Crabb in *Saldivar v. Cadena*, 622 F.Supp. at 954-956, which the Court of Appeals relied upon in this case. 885 F.2d at 408.

The Wisconsin Supreme Court has expressly left open the question of whether, in light of *Owens*, Section 893.54 or Section 893.53, Wis. Stats., applies to Section 1983 actions in Wisconsin state courts. *Felder v. Casey*, 150 Wis.2d 458, 441 N.W.2d at 729. Furthermore, it should be noted that the Wisconsin Attorney General's office has, in light of the Court of Appeals decision in this case, conceded that *Hanson* is no longer applicable in Section 1983 actions in Wisconsin's state courts. Letter to Judge Angela B. Bartell from Assistant Attorney General Bruce A. Olsen, October 24, 1989, *Lindas v. Cady*, No. 85-C-5371 (Circuit Court, Dane County, Wisconsin) (R. App. at 1a)

Thus, the Court of Appeals decision in this case is not in conflict with the Wisconsin's court of last resort on this issue.

II. PETITIONERS FAILED TO TIMELY RAISE BELOW THE ISSUE THEY NOW RAISE CONCERNING THE COURT OF APPEALS DECISION REFUSING TO PRECLUDE PLAINTIFF'S CLAIMS, AND THEY HAVE, THEREFORE WAIVED THAT ISSUE.

A. Petitioners Did Not Raise Below the Question of the Preclusive Effect of Respondent's Voluntary Dismissal of Her Title VII Claims in Her Action Against the County of Dane.

Petitioners did not raise, either in the district court or the Court of Appeals below, the question of the

preclusive effect of respondent's voluntary dismissal, under 41(a) of the Federal Rules of Civil Procedure, of her Title VII claims in her action against the County of Dane which preceded her action below. In her briefs in the district court and the Court of Appeals below petitioners argued the effect of an involuntary dismissal under Rule 41(b), F.R.C.P., without specifically referring to respondent's Title VII claims anywhere in their argument. Petitioners did not argue, in either forum, the effect of the voluntary dismissal of her Title VII claims pursuant to Rule 41(a), F.R.C.P. Petitioners first raised the issue of the preclusive effect of the dismissal of respondent's Title VII claims against the County of Dane in their oral argument before the Court of Appeals in this case. Respondent did not have an opportunity to respond to that oral argument, and the Court of Appeals did not expressly consider petitioners' argument concerning the Title VII dismissal in its decision. (P. App., p. 1A.)

Petitioners should therefore be deemed to have waived their objection to the district court and the Court of Appeals decision on the preclusion issue concerning the voluntary dismissal of her Title VII claims.

B. Even If Petitioner Had Raised the Issue of the Preclusive Effect in This Action of Her Voluntary Dismissal of Her Title VII Claims in Her Action Against the County of Dane, The Issue Would Not Be Ripe for Determination By This Court.

The Court of Appeals in this action did not decide, nor did the parties brief, the issue of the preclusive effect, if any, of respondent's voluntary dismissal of her Title VII

claims in her prior action against the County of Dane. The determination of the preclusion issue would certainly turn, in part, upon the question of whether petitioners would have been proper parties defendant in their individual capacities under Title VII in respondent's action against the County of Dane. If respondent could not have sued petitioners for damages in their individual capacities under Title VII, then under the same rationale applied by the Court of Appeals regarding the preclusive effect of respondent's Section 1983 claim against the County of Dane, the application of *Res Judicata* or collateral estoppel would not be appropriate.

The Court of Appeals for the Seventh Circuit has not yet decided the issue of whether an employer's supervisors can be held liable for damages in their individual capacities under Title VII. *Bertoncini v. Schrimpf*, 712 F.Supp. 1136, 1339 (N.D. Ill. 1989).

The issue of the preclusive effect of respondent's voluntary dismissal of her Title VII claim against the County of Dane in her prior action is not ripe for consideration by this Court.

III. CONCLUSION

For the reasons stated above, the Petition for Certiorari does not establish "special and important reasons" that would support issuance of a Writ of Certiorari under Rule 10.1, Revised Rules of Supreme Court. The petition should be denied.

Respectfully submitted this 23rd day of February, 1990.

Jeff Scott Olson
Julian, Olson & Lasker, S.C.

A. Steven Porter

Attorneys for Respondent
Cheryll Gray

330 E. Wilson Street
Madison, Wisconsin 53703
(608) 255-6400

25 W. Main Street, Suite 503
Madison, Wisconsin 53703
(608) 255-5170

APPENDIX

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

DONALD J. HANAWAY
ATTORNEY GENERAL

Mark E. Musolf
Deputy Attorney General

Division of Legal Services
James D. Jeffries, Administrator

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Bruce A. Olsen
Assistant Attorney General
608/266-2580

RECEIVED
OCT 25 1989

JULIAN, OLSON & LASKER S.C.

October 24, 1989

The Honorable Angela B. Bartell
Circuit Court, Branch 10
City-County Building, Room 329
Madison, Wisconsin 53709

Re: *Lindas v. Cady, et al.*,
Case No. 85-CV-5371.

Dear Judge Bartell:

Ms. Lindas has moved for reconsideration of that portion of the court's August 14, 1986 memorandum decision and order regarding whether her claim under sec. 1983 is barred by the statute of limitations. The state employe defendants agree with counsel's assertion that the courts recently have applied a six-year statute of limitations to such claims, making them timely in this case.

The defendants, however, take the position that the sec. 1983 claims are barred by the doctrine of administrative *res judicata* by reason of a decision of the Personnel Commission dated January 3, 1985, which found no probable cause to believe that DHSS unlawfully discriminated against Ms. Lindas on the basis of sex. A copy of that decision is attached to this letter brief.

In *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986), the court held that when a state administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it (which the parties have had an adequate opportunity to litigate), a federal court in a section 1983 action must give preclusive effect to the agency's findings of fact if such findings would be entitled to preclusive effect in the state courts. This doctrine of administrative *res judicata* should apply equally to section 1983 actions in state courts.

Although no Wisconsin appellate court decision clearly establishes whether the doctrine of administrative *res judicata* would apply to the facts of this case, *see Lindas v. Cady*, 150 Wis. 2d 421, 431 (1989), the Seventh Circuit in *Patzer v. Board of Regents*, 763 F.2d 851, 857 n. 5 (7th Cir. 1985), was confident that Wisconsin courts would follow the general rule that final administrative decisions are *res judicata* as to the claims decided. Some Wisconsin cases suggest that preclusive effect will be given to administrative agency decisions. *Acharya v. AFSCME, Council 24 v. WSEU*, 146 Wis. 2d 693, 698, 432 N.W.2d 140 (Ct. App. 1988). *Mathews v. Big Foot Country Club*, 7 Wis. 2d 244, 247, 96 N.W.2d 327 (1959); *Sheehan v. Industrial Comm.*, 272 Wis. 595, 604, 76 N.W.2d 343 (1956); *State ex rel. Priegel v. Northern States Power Co.*, 242 Wis. 345, 353, 8 N.W.2d 350

(1942). Other cases suggest the opposite. *Fond du Lac v. Department of Natural Resources*, 45 Wis. 2d 620, 625, 173 N.W.2d 605 (1970); *Board of Regents v. Wisconsin Personnel Commission*, 103 Wis. 2d 545, 552, 309 N.W.2d 366 (1981); *Kramer v. Horton*, 128 Wis. 2d 404, 419, 383 N.W.2d 54 (1986).

None of the latter three cases, however, involved a contested case hearing in which a factual issue had been resolved adversely to the party seeking to relitigate that same issue in a second case. Moreover, the court's statement in *Kramer*, 128 Wis. 2d at 419 ("a section 1983 plaintiff can pursue a claim in federal court even after exhausting state administrative remedies because *res judicata* and collateral estoppel do not attach to state administrative agency determinations") does not address section 1983 actions in state court and is flatly contradicted by *Elliott* which was decided four months after *Kramer*.

The defendants submit that Wisconsin courts should apply the doctrine of administrative *res judicata*. As the Supreme Court pointed out in *Elliott*, 106 S. Ct. at 3266:

> [G]iving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose. This value . . . encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources.

Federal appellate courts have not hesitated to apply the doctrine of administrative *res judicata*. *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892 (7th Cir. 1987); *Kirkland v. City of Peekskill*, 828 F.2d 104 (2d Cir. 1987).

In Lindas' case, after several days of hearing in which Lindas was represented by counsel and was afforded an adequate opportunity to litigate, the Wisconsin Personnel Commission decided that there was no probable cause to believe that DHSS unlawfully discriminated against her on the basis of sex. *Kathleen Lindas v. DHSS*, Case No. 80-PC-ER-96 (January 3, 1985). The fact that the Personnel Commission's decision was on the issue of probable cause, rather than on the merits, does not preclude application of the doctrine of administrative *res judicata* since Lindas received a full and fair hearing, and since the Personnel Commission decided adversely to Lindas the same issue which she seeks to litigate in this action, namely, whether she was constructively discharged because of her sex. *Cf. Zywicki v. Moxness Products, Inc.*, 610 F. Supp. 50 (E.D. Wis. 1985), *reversed and remanded on other grounds*, 801 F.2d 1343 (7th Cir. 1986). Consequently, DHSS submits that Lindas' section 1983 claim against it is barred, under the doctrine of administrative *res judicata*, by the decision of the Personnel Commission.

For the foregoing reasons, the defendants respectfully request that the plaintiff's claims under sec. 1983 be dismissed

Sincerely,

/s/ Bruce A. Olsen
Bruce A. Olsen
Assistant Attorney General

BAO:jcd
Enclosures

cc: Jeff Scott Olson